

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DELANO LEE BOATWRIGHT,

Defendant-Appellant.

UNPUBLISHED

October 17, 2006

No. 263445

Genesee Circuit Court

LC No. 05-015552-FH

Before: White, P.J., and Zahra and Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv). He was sentenced to probation for 24 months, with 180 days in jail. He appeals as of right. We affirm.

Defendant argues that the trial court erred in allowing Officer Urban to testify as an expert because his testimony was impermissible “drug profile” evidence. Defendant’s issue blends two separate inquiries: (1) whether the court erred in allowing Officer Urban to testify as an expert and (2) whether Officer Urban’s testimony was impermissible drug profile evidence.

Neither challenge is preserved. Although defendant objected to Officer Urban’s qualification to provide expert testimony, he did not challenge the testimony on the basis that it would be improper drug profile evidence. “An objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground.” *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). He also did not object during the testimony on the basis that it was improper drug profile evidence. Therefore, we review these unpreserved issues for plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 764-767; 597 NW2d 130 (1999).

Defendant has not shown that the trial court’s decision to allow officer Urban to testify was “plain error.” The prosecution offered Officer Urban as an expert to explain “the nature, means and modes of drug trafficking” in the county. To the extent there was a potential that Officer Urban might delve into inadmissible drug profile evidence, an appropriate objection could have prevented such evidence. There was no reason for the court to exclude the expert testimony in its entirety.

Defendant also has not shown that Officer Urban's testimony was "plain error." For the most part, Officer Urban's testimony did not concern drug profile evidence, i.e., "an informal compilation of characteristics often displayed by those trafficking in drugs." *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999) (citation and internal quotation marks omitted). With regard to Officer Urban's testimony about drug dealers carrying cash and the recovery of \$166 from defendant's pants pocket, Officer Urban acknowledged that there was nothing illegal or suspicious about people carrying cash. Thus, he did not clearly link the information to defendant in a way that his guilt was implied merely from his resemblance to a drug profile. *Id.*, p 62. Moreover, this same information had already been elicited from another officer with no objection from defendant.

Thus, neither the trial court's decision to allow Officer Urban to testify as an expert nor the testimony itself amounted to plain error affecting defendant's substantial rights.

Defendant also argues that the trial court abused its discretion by denying his posttrial motion for a new trial, which was based on the jury's consideration of a map that had been left in the jury room. This Court reviews a trial court's denial of a new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003).

Defendant's motion and the prosecution's response to the motion agreed that a map had been left in the jury room and that the jury considered it in evaluating the credibility of defendant's explanation for being in the area at the time of the incident. The parties and the court learned of the map during post-trial discussions with the jury. Neither party's brief was supported by any evidence. Relying on its recollection of the discussion of this matter with the jurors, the trial court concluded that the map was not an important factor in the jury's assessment of defendant's credibility.

To establish entitlement to relief on the basis of a jury's consideration of an extrinsic influence, a defendant must prove (1) that the jury was exposed to extraneous influences and (2) that they "created a real and substantial possibility that they could have affected the jury's verdict." *People v Budzyn*, 456 Mich 77, 88-89; 566 NW2d 229 (1997).

Generally, in proving this second point, the defendant will demonstrate that the extraneous influence is substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict. If the defendant establishes this initial burden, the burden shifts to the people to demonstrate that the error was harmless beyond a reasonable doubt. [*Id.*, p 89 (citations omitted).]

To determine whether the extrinsic influence created a real and substantial possibility of prejudice, the court may consider the following factors:

(1) whether the material was actually received, and if so how; (2) the length of time it was available to the jury; (3) the extent to which the juror discussed and considered it; (4) whether the material was introduced before a verdict was reached, and if so at what point in the deliberations; and (5) any other matters which may bear on the issue of the reasonable possibility of whether the extrinsic material affected the verdict. [*Id.*, p 89 n 11 (citation omitted).]

There is no dispute that the map was in the jury room and jurors indicated that it had been used during deliberations. But there was no evidence concerning the extent to which the map was discussed and considered. Defendant did not show that the extraneous influence created a real and substantial possibility that it could have affected the verdict. The map was not substantially related to a material aspect of the case. The map may have been useful to assessing defendant's credibility, but only on an insignificant point, i.e., the reason he was in the area of the crime. Defendant did not show a direct connection between the map and the verdict. *Budzyn, supra*, pp 88-89. The trial court concluded that the jury's assessment of defendant's credibility was based on the evidence admitted at the trial and that the map was superfluous. In the absence of any evidence to the contrary, there is no basis for concluding that the trial court abused of discretion.

Affirmed.

/s/ Helene N. White

/s/ Brian K. Zahra

/s/ Kirsten Frank Kelly